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No. 71-655

In the Supreme Court of the United States

OCTOBER TERM, 1971

FRANCIS PETER CROSBY AND VINCENT JOSEPH CALISE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App.).

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1971. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to November 15, 1971. The petition was filed on November 12, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the convictions.

2. Whether the instructions to the jury on aiding and abetting correctly stated the law.

3. Whether the substantive counts of the indictment were defective.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of having conspired to violate 18 U.S.C. 657 by injuring and defrauding a company licensed under the Small Business Administration Act of 1953. Petitioner Crosby was also convicted of five substantive violations of Section 657.[1] Petitioner Crosby was sentenced to an interim commitment for a study pursuant to 18 U.S.C. 4208 (b) pending final sentence. Petitioner Calise was sentenced to imprisonment for one year and a day. The court of appeals affirmed without opinion (Pet. App.).

At trial co-defendant Pierson, who pleaded guilty, and two unindicted co-conspirators (Olanow and Stone) testified as prosecution witnesses. Their testimony, plus documentary proof in the form of letters, signed agreements and cancelled checks introduced by the government, showed a scheme to purchase Roosevelt Capital (Roosevelt), a small business investment company licensed by the Small Business Administration (S.B.A.), with Roosevelt's own funds, and thereafter

[1] Petitioner Calise was charged only in the conspiracy count.

to mulct the company's remaining funds[2] principally through three loan transactions with shell corporations created by various of the co-conspirators.

1. Early in 1964, petitioner Crosby, the owner of a company named Contractor's Guild (Contractors) (T. 283, 597),[3] employed Olanow as a finder (T. 77–78), indicating interest in acquiring small business investment companies (T. 86). Thereafter, Olanow learned that Roosevelt was for sale. On Crosby's instructions, Olanow entered into an agreement, dated April 28, 1964, with Talmadge, one of the Roosevelt owners, to purchase Roosevelt (T. 88–95). When Pierson agreed to act as ostensible buyer of Roosevelt (T. 93) (with the understanding that the company was to be owned by petitioner Crosby through Contractors (T. 280–282)), Olanow transferred the agreement to Pierson. Crosby told Olanow that Pierson would sign all documents and would be responsible for paying Olanow the $10,000 finder's fee which Crosby had agreed to pay (T. 93–95).

Prior to the Roosevelt closing, Crosby explained to Pierson that part of the money to purchase Roosevelt would come from a loan of $42,000 by an individual named Fiorito who was to be repaid immediately. In addition the two men discussed loans to be made by Roosevelt upon its acquisition, one to United Film

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[2] Roosevelt, which had conducted business since February 1962 (T. 57), had originally been capitalized with a stockholders' contribution of $155,000 and an S.B.A. loan of $150,000. At the time the conspirators took control, on May 14, 1964, Roosevelt's capital ($305,000) was divided between a $118,000 loan portfolio and $187,000 in cash and matured Treasury notes (T. 688–690).

[3] "T." refers to the transcript of proceedings.

World (a company formed by Crosby and Pierson) and another to an organization named Trans-World Theatricals (Trans-World). So that it would not appear that the United loan represented self-dealing, new directors, among them petitioner Calise, were named for United (T. 303–304). Pierson and two other men, Stone, an attorney, and Wallen, were designated to be officers of Roosevelt.

Before the closing, Crosby met Pierson, Calise and Stone in a coffee shop and gave them instructions (T. 97, 98, 104, 294, 585–587). At the closing, which Crosby did not attend, it was discovered that Fiorito had not arrived with the loan money. Olanow went to another room and produced two cashier's checks of the Franklin Bank, one for $118,000 and another for $42,000 (T. 295–297, 311). This money came from Roosevelt funds.[4]

Immediately after the closing Pierson issued on the Roosevelt account a check for $60,000 which Stone endorsed to open an account for United (T. 304–308). Petitioner Calise, a United director, immediately issued a $42,000 check on the United account to Pierson which was used to repay the remaining $42,000 of the $160,000 purchase price money advanced by the

[4] Talmadge, a representative of Roosevelt's sellers, issued a letter to the Franklin Bank authorizing the transfer of $187,000 in Roosevelt funds from the Islip office to the Hanover Square office (T. 693–694, 823–824). Mastrodano, the bank officer, then issued the two cashier's checks (Gov't Exhs. 7A and 7B) to Talmadge. Talmadge endorsed the larger check back to Roosevelt in payment for the loan portfolio which the sellers retained (T. 297). Roosevelt then repaid $118,000 of the $160,000 Franklin Bank advance.

Franklin Bank (T. 304, 308–311). This completed the purchase of Roosevelt with its own assets.

Petitioner Calise also wrote a letter to the Franklin Bank authorizing the release of $10,000 in United funds payable to Pierson which was used to pay Fiorito's commission.[5] In addition, Pierson issued a second check (Gov't Exh. 14 B) on the Roosevelt account, again for $60,000, the proceeds of which were used to open an account for Trans-World (T. 315). Meyers, the president of Trans-World, as he had agreed earlier with petitioner Crosby (T. 213–217), then loaned $44,000 to Contractors which was used to open an account in its name (T. 315–317). Thereafter, the petitioners, Pierson, Stone and Olanow discussed the closing and Pierson issued checks to Olanow and Stone for their services (T. 103, 109–110).

A few days after the closing, after a discussion among petitioner Crosby, Olanow and Pierson, Roosevelt gave Olanow a thirty-day loan of $58,648 to purchase 1,000 shares of Texas Gulf Sulpher stock. A week later, June 4, 1964 (T. 832), after the stock had dropped $10,000 in value, Crosby and Pierson informed Olanow that the stock would have to be used for the purchase of stock in a company called Wiek Investing Corporation (T. 115, 117–118). The stock was given to another shell, United Nation's Financial

[5] Fiorito arrived late at the closing (T. 103–104), and was brought to the meeting by petitioner Calise (T. 296). Olanow's decision to go ahead without Fiorito was motivated by a desire to avoid a commission (T. 297), but it was discovered that a commission "had to be paid Mr. Fiorito" whether his check was used or not (T. 312).

(U.N.), which had been formed by Stone some days earlier at petitioner Crosby's request (T. 364–365, 383–384, 595, 599–600), and U.N. then used the stock as a down payment for the purchase of the Wick Investment Corporation (T. 382–383). Olanow repaid the $10,000 loss he had incurred in his stock speculation, but not to Roosevelt (T. 117, 119–121).[6]

The three loan transactions involving United, Contractors through Trans-World,[7] and U.N. were sham transactions involving no real security (T. 306–308, 317, 384). Indeed, no interest was paid or demanded on these loans, nor was there any effort made in 1964 to collect them (T. 407–408). The assets of the borrowing companies not dissipated by other transactions were, by the fall of 1964, wasted through so-called business expenses charged to the companies (T. 429–433). For example, following the closing Pierson maintained his family at a New York hotel and made a number of trips, including one to Europe (T. 341–342, 343, 354, 365, 371, 373–374, 402). Other individuals with no real connection with any of the companies charged similar expenses (T. 350, 351, 353–354, 365, 372). A number of checks were issued to petitioner

[6] Olanow signed a note acknowledging the debt to United. Thereafter, he made payments to various corporations and individuals designated either by petitioner Crosby or Pierson (T. 120–123). One of the checks (Gov't Exh. 67 C) was endorsed by petitioner Crosby for deposit to Contractors' account.

[7] The charges in this case did not include the $16,000 in Roosevelt funds retained by Trans-World, but pertained only to the $44,000 loaned to Contractors through Trans-World (T. 241, 407).

Calise for expenses on a leased vehicle (T. 338, 357–358, 374).[8] The proof showed that other checks for substantial sums of money, totalling at least $27,000, had also been issued to petitioner Calise (T. 335, 351–352, 354, 362). It was, however, Pierson's belief, based upon the relationship of the petitioners, that Calise was simply cashing checks and turning the proceeds over to Crosby (T. 355–356, 362–363).

ARGUMENT

1. The sufficiency of the evidence to support the conviction is established by the summary of the facts in the Statement. As to Crosby, it was shown that the conspiracy had its origins in his plans to acquire capital through the acquisition by nominees of one or more small business investment companies. Thereafter, he directed and controlled the activities of the others in purchasing Roosevelt and manipulating its funds. The verdict of guilty as to Crosby was supported by the evidence.

While petitioner Calise was not shown to have been a principal in the conspiracy, there was, as the trial court ruled (T. 53), sufficient evidence to make his guilt a jury question. Calise was aware of the object of the conspiracy. He worked closely with Crosby and was present with all of the co-conspirators at meetings before and after the Roosevelt purchase. His activities were more than those of an "errand boy" (Pet. 6). At the bank he brought in Fiorito whose money, at least as

[8] The endorsement on one check indicated it had been used in payment of petitioner Calise's rent (T. 358).

originally planned, was needed to purchase Roosevelt. As an officer of United, he authorized payment to Pierson for his role as the finder of Roosevelt. He issued a United check to pay the bank part of the purchase price ($42,000). He also obtained and endorsed checks for substantial sums which he may have turned over to petitioner Crosby. The jury could reasonably conclude that petitioner Calise was a knowing participant in the conspiracy.

2. Petitioner Crosby objects to the trial court's instructions on aiding and abetting. The argument is that since Pierson, who is described as the only conceivable principal, had pleaded guilty to only one substantive count, petitioner Crosby could not be convicted of aiding and abetting more than one substantive crime. This argument is frivolous.

Assuming that the jury regarded petitioner Crosby as an aider and abettor and not as a principal, his convictions on the substantive counts did not depend upon the disposition of Pierson's case. The government was required to prove, as it did, that the substantive crimes charged were committed by some one.* It was also required to prove the aiding and abetting by petitioner Crosby. *White* v. *United States*, 366 F.2d 474 (C.A. 10). There was no requirement that, before Crosby could be found to have aided or abetted each substantive crime, the principal had to be convicted or even identified. *United States* v. *Provenzano*,

* Pierson and the other named co-conspirators were all individuals who in the language of the statute violated, 18 U.S.C. 657, were "* * * connected in any capacity with * * * any small business investment company," Roosevelt, and thus were possible principals.

334 F.2d 678, 691 (C.A. 3), certiorari denied, 379 U.S. 947. See also *Feldstein* v. *United States*, 429 F.2d 1092 (C.A. 9), certiorari denied, 400 U.S. 920; *Hendrix* v. *United States*, 327 F.2d 971, 975 (C.A. 5). There was substantial evidence to show that petitioner Crosby was associated with each substantive crime proven, that he participated in it as something he wished to bring about, and that he sought by his action to make it succeed. *United States* v. *Peoni*, 100 F.2d 401, 402 (C.A. 2). More was not required.

3. Relying upon *United States* v. *Britton*, 107 U.S. 655, and later cases, petitioner contends that the substantive counts of the indictment were defective in that, while they charged misapplication of Roosevelt funds, they failed to specify the means and illegality of the misapplication. However in this case, petitioner Crosby was not charged simply with willful misapplication, as were the defendants in the authorities relied on by him. The charge on the substantive counts was that petitioners Crosby and Pierson "unlawfully, wilfully and knowingly, and with intent to injure and defraud (Roosevelt), did embezzle, abstract, purloin and wilfully misapply (Roosevelt) moneys * * *." It was thus clear that the substantive counts of the indictment could not be read to charge mere "maladministration," the danger with which this Court was concerned in *Britton*, see 107 U.S. at pp. 667–668.[10] The confusion now asserted as to whether the

[10] *Britton* was decided under a former statute having to do with misapplication by officers of national banks. The indictment contained 119 counts some of which were held sufficient and others insufficient. The defendant, a president of an association,

government's theory was that petitioner Crosby had embezzled or misapplied Roosevelt funds could have been clarified by a motion for a "bill of particulars." That no such motion was ever made (T. 59) indicates that petitioner was apprised of the nature of the charges.[11]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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was charged in Count 37 and other similar counts with having "wilfully misapplied its moneys * * * by buying therewith certain shares of its stock, with intent to injure and defraud the association * * *." As to those counts this Court ruled that it was not enough to aver that the defendant willfully misapplied the monies, concluding that "[t]here must be averments to show how the application (conversion) was made and that it was an unlawful one." 107 U.S. at 669.

[11] The fact that Pierson entered a plea of guilty to what was described as embezzlement (T. 7) while the government's announced theory of the case was that of willful misapplication (T. 763–764) is no evidence that the jury was confused and left to speculate as to petitioner Crosby's guilt. The court's instructions defined for the jury the meaning of the term misapplication.

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